

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss

SUPREME JUDICIAL COURT
SINGLE JUSTICE SESSION
NO. SJ-2018-

COMMONWEALTH

V.

ALEXA FENCHER

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COMMONWEALTH'S
APPLICATION
FOR INTERLOCUTORY RELIEF

Now comes the Commonwealth through its District Attorney Michael D. O'Keefe and pursuant to G.L. c. 278, §28E and Mass. R. Crim. P. 15 (a)(2) moves this Honorable Court to reverse the decision of the motion judge where he allowed the defendant's motion to suppress, or in the alternative, allow the Commonwealth to pursue an appeal of the allowance of the motion to suppress.

As reasons therefore, the Commonwealth states that the motion judge erred as a matter of law when he found there was no probable cause to seize the defendant's cellular telephone, despite the defendant admitting that she had her phone on her and took video and used "Snapchat" during the evening, received phone calls and texts from her grandmother discussing the assault the morning after, and the evidence that the defendant was a suspect in the crime.

STATEMENT OF THE CASE¹

1. The defendant was indicted before a Barnstable County Grand Jury on January 27, 2017 for "Home Invasion," G.L. c. 265/18C; "Armed Burglary," G.L. c. 265/14; "Assault to Murder," G.L. c. 265/15; "Assault to Maim," G.L. c. 265/15; and "Mayhem," G.L. 265/14.

(A/5)

2. The defendant was arraigned in Barnstable Superior Court before Nickerson, J. on March 9, 2017. (A/6)

3. On February 12, 2018, the defendant filed a motion to suppress the cellphone. (A/6)

4. Evidence on the motion was heard on May 25 and 28, 2018, before Nickerson, J. (A/7)

5. The defendant's motion was allowed on July 24, 2018. (A/8)

6. On July 26, 2018, the Commonwealth filed a timely notice of appeal and a motion to stay proceedings pending appeal in the Barnstable Superior Court. (A/8)

7. As of this date, the notice of appeal and stay have been docketed. The stay has not been acted upon, as

¹ Citation format will be as follows: to the transcript on May 10, 2018 as (Vol.1/pg#), to the transcript on May 24, 2018 as (Vol.2/pg#), to the transcript on July 10, 2018 as (Vol.3/pg#), and to the transcript on July 24, 2018 as (Vol.4/pg#). The citation to the defendant's interview will be (D.Int.pg#). The citation to the supporting exhibits will be (Ex.#).

defense counsel indicated to the Superior Court Clerk's Office that he intends to oppose the stay. The Commonwealth provided the transcript of the allowance of the motion to suppress to defense counsel on August 9, 2018. An opposition has not been filed by defense counsel as of this date. The next court date is September 14, 2018. (A/8)

STATEMENT OF FACTS

On Friday, September 23, 2016 at approximately 4:27 A.M., Barnstable Police received a 911 call for an assault at 37 Wedgewood Drive in Centerville. (1/6-1/7). The victim, Alfred Boutiette, indicated that he was assaulted while he was sleeping. (1/11) He told the 911 dispatcher that he suspected his niece, Alexa Fencer, was involved, as there was an active restraining order against her. (1/11)

Sergeant Jason Laber and Officer Brian Jones responded to the home. (1/7) Police observed the victim with serious facial and head injuries, and a large amount of blood on the floor, walls, and bed. The victim had a large laceration above his right eye; he was "completely covered in blood." (2/121) The house was not ransacked and there did not appear to be

any stolen items. (1/51) Further, there was no sign of forced entry. (1/58)

Boutiette gave a statement to police at the scene. (1/53) He stated again that he suspected his niece, the defendant, Alexa Fencher, because her car was observed parked at his house earlier that day when he got home. (1/53) Boutiette reiterated that he had a restraining order against the defendant that was active during the time of the assault. (1/53) When he called 911 that evening, he looked out the window and noticed that the defendant's car was no longer parked in the driveway. He stated the car was a white Hyundai Sonata. (1/53) The victim said he was afraid of Fencher, as she had threatened him within the last month. (1/128)

During the victim's statement, Officer Jones noted that earlier in the evening he observed a car registered to "Alexa Fencher." At 3:06 A.M., Jones was parked at the Centerville Plaza in a marked cruiser. (2/28, 116) He saw a white Hyundai Sonata drive past on Route 28. (2/28, 117-118) He followed the car, and observed it turn onto Wedgewood Road. (2/28, 116) The car then did a u-turn at the entrance to Wedgewood. (2/28, 116) Jones attempted a

registration check, but the computer was not working. An in-house database indicated that the car was registered to Alexa Fencher. (2/28, 117-118) He turned around and followed the car which drove down Fuller Road, took a left on Old Stage Road, and then returned to Route 28. (2/118-119) Observing no motor vehicle infractions, Jones returned to his sector.

After Jones recalled this interaction about an hour earlier, he asked the victim for a description of the defendant. (2/124-125) The victim's description matched the image of Fencher stored in the registry database. (2/124-125) Jones then "put all the pieces together" and called dispatch and issued a "be-on-the-lookout" for Fencher's vehicle. (2/125)

While Laber was at the house he contacted the victim's parents, Lillian (a/k/a Aliya) and Alfred Boutiette (who are also the defendant's grandparents). (1/15) Laber had a brief conversation and told Lillian that he was looking for Alexa Fencher, and asked Lillian to have her call Detective Foley of the Barnstable Police. (1/16) Lillian said had not heard from her granddaughter. (1/16)

The victim was transported to Cape Cod Hospital to receive treatment for his injuries. (1/51) He was

eventually transported to Massachusetts General Hospital. Officer Jones went to the hospital to get information from the victim, however he was unsuccessful as the victim was intubated. (2/128)

Detective Robert Bitinas recalled that there was a be-on-the-lookout for a white Hyundai Sonata during the morning's roll call. (1/27) Bitinas made observations of a white Hyundai Sonata in the parking lot that very morning, driven in by the defendant. (1/29-33) He walked around the car, and observed what appeared to be bloody handprints on the rear driver's side door. (1/30) The fingerprints "stood out" on the white car. (1/30) Bitinas took photographs of the fingerprints and sent them to Detective Foley, who was conducting the interview with Fencher at that same time. (1/30-33)

Detective Kevin Connolly, of the Barnstable Police Department, conducted a forensic download of Fencher's phone the same day as her interview, September 23, 2018. (2/142) He explained he was able to conduct an extraction, and was able to recover digital and social media files. (2/144)

Defendant's Interview²

The defendant was interviewed by Detectives David Foley and Peter Ginnetty³ at the Barnstable Police Department on September 23, 2016 at 9:48 A.M. (D.Int.2) The detectives read a form and provided the same to Fencher, which explained her Miranda rights. (D.Int.2) She signed and waived her rights. (D.Int.2-6)

Fencher stated that her grandmother, Aliya Boutiette, called her cellphone multiple times on the morning of September 23, 2018. (D.Int.6) She woke up to missed calls and texts, described as "a bunch of calls," including "two calls from [her] girlfriend," Roshanna Perez. (D.Int.6, 7, 8) She woke up after 8:00 A.M., and had class at 9:00 A.M. (D.Int.6) She was running late because she was staying at a friend's house. (D.Int.6) They went out to a bar, Red Face Jacks [sic], and watched the Patriots game. (D.Int.6)

² The defendant pulls her phone out of her pocket, looks at it, and even shows detectives the screen on various points during the interview. It is recommended that the Court watch the video while reading along in the transcript, to see the defendant pull her phone out and reference it.

³ Detective Gideon in the transcript is Detective Peter Ginnetty.

Perez told the defendant to call her grandmother back. (D.Int.9) The defendant called her grandmother, who told the defendant "you guys [the police] were holding [her] as a primary witness" "for something that happened to my uncle at the house." (D.Int.7) Aliya explained that the defendant's uncle was hurt very badly. (D.Int.8)

The defendant told Foley that she was at Red Face Jacks and the tavern across the street from Pirates Cove mini golf last night. (D.Int.10) She was with some of her friends she used to work with. (D.Int.11) She went to the bars with her friend Basuda Magnum and then went to her friend's house on Quaker Road in Hyannis. (D.Int.11) The group arrived there at 1:00 A.M. (D.Int.12) Her friends Brian and Gio were also at the house playing pool. (D.Int.12) She left at 3:00 A.M. to go smoke near the Bourne Bridge. (D.Int.12) The defendant had someone else drive her car, because she was intoxicated. (D.Int.14)

Detective Foley asked the defendant how she got her car. The defendant stated that she knew that there was the restraining order keeping her away from her uncle. (D.Int.14) She had someone else drive her to get the car. (D.Int.14, 16) The car was at 37

Wedgewood Road. (D.Int.16) She did not remember who she was with, as she was with five to six people, including Brian, Gio, and Magnum. (D.Int.17) Fencher then described how she got to the house on Quaker Road. (D.Int.19)

Foley asked the defendant, "so, you leave the bar. Somebody's driving you. You're not sure whose car you were in, but they drive you right to go pick up your car in Centerville?" (D.Int.19) The defendant responded, "I actually have videos of me being at the bar and stuff." (D.Int.19) Foley said he wanted to look at the videos later, and the defendant replied, "definitely." (D.Int.20)

Fencher's car was parked in the driveway, near the boat. (D.Int.20) Fencher gave her keys to someone in the car (she does not know who) and they drove her car back to the house. (D.Int.20-21) She was too intoxicated to drive, as she had roughly eight drinks and did not eat food. (D.Int.21)

She said that she stopped at Speedway to get a sandwich after she left Wedgewood to go to Quaker Rd. (D.Int.23) She did not remember what time it was after the detective reminded her that all businesses in

Barnstable are closed between 1:00 A.M. and 3:00 A.M.
(D.Int.23)

Fencher remembered being at a beach near the Bourne bridge, smoking and watching the sunrise.
(D.Int.25) She did not remember what time she left.
(D.Int.25)

Fencher did not remember hearing the phone ring that morning from her grandmother's texts or calls.
(D.Int.26) Fencher then pulls her phone out from her pocket and read the times of calls to the detective.
(Video 10:10:20) (D.Int.26) "Okay, I got it. Unknown at 7:32" (D.Int.26) She refers to a text from her girlfriend at 7:31 A.M. (D.Int.26) Fencher then stated further, "[t]wice. She called me twice. 7:26 she called me five times. Yeah. I was sleeping during all this. My grandmother called me 6:42. Sleeping." 26
Fencher slept on the couch and Ricky slept on the floor. (D.Int.27) Her phone was on the charger.
(D.Int.27)

Fencher stated that she knew her phone needed to be charged because, "In one of my videos with Snapchat. . . it says my phone is dying." (D.Int.27) She said this video is from "last night." (D.Int.27) The phone was plugged in when she went to sleep.

(D.Int.28) That morning Fencher was "hungover," but not drunk. (D.Int.28) She drank "Henny and coke" and "Grey Goose and cranberry." (D.Int.28)

Fencher explained that her car was left at Wedgewood when she stayed there with her grandmother a couple days prior. (D.Int.29) She was still at the house on the prior evening at 8:00 P.M. when her friends asked her to go watch the Patriots game. (D.Int.30) Her uncle was not there at that point, and she did not know that he was going to be at the house. (D.Int.30) She realized that her uncle was at the house when she went home that evening to pick up her car. (D.Int.30) She did not tell the friends in her car about the restraining order. (D.Int.30)

Fencher stated that she had a key to the house. (D.Int.30) It was on her keychain for her car. (D.Int.30)

Judge's Findings

The motion judge, Nickerson, J., ruled from the bench on the defendant's motions to suppress. There were various issues raised in the motion. The court ruled, and the Commonwealth is not challenging, that the defendant did not consent to have her cellphone searched. The court suppressed the defendant's

statements after 10:13 A.M., when she asked to talk to her grandmother or a lawyer mid-interview, which the Commonwealth is also not challenging.⁴

The Commonwealth is only appealing the Court's findings regarding the seizure of the cellphone.

(4/16-17) The motion judge found that there was no probable cause to support the seizure of the cellphone through an analysis of *Commonwealth v. White*. (1/17) The judge stated that pre-White analysis of seizing phones was, "[t]hat, gee, we've got a violent crime, or we have a serious crime. Gee, more than one person was involved in this crime. Gosh, in this day in age, people communicate by cellphones, either texting or message, or doing something. Therefore, where there's more than one person involved in this crime, there had to be some communication between them. So, let's grab the cellphone." (4/16-17) The judge's findings regarding the seizure are on pages 4/15 to 4/18.

⁴ The suppression starts at page 66 in the interview (D.Int.66).

ARGUMENT

I. THE MOTION JUDGE ERRED WHEN HE FOUND THAT THE DEFENDANT'S CONSENT TO SEARCH HER CELLPHONE WAS TAINTED BY AN ILLEGAL SEIZURE, WHERE THE SEIZURE WAS CLEARLY SUPPORTED BY SPECIFIC, ARTICULABLE PROBABLE CAUSE, AS THE DEFENDANT RECORDED HER EVENING AT BARS ON THE NIGHT OF THE ASSAULT ON HER PHONE WITH VIDEO AND SNAPCHAT.

A. Standard of Review.

In reviewing a motion to suppress evidence, an appellate court adopts the motion judge's subsidiary findings of facts absent clear error. *Commonwealth v. Ocasio*, 434 Mass. 1, 4 (2001). Although a reviewing court gives substantial deference to the judge's ultimate findings and conclusions of law, the reviewing court must independently review the correctness of the judge's application of constitutional principles to the facts as found. *Commonwealth v. Eckert*, 431 Mass. 591, 593 (2000) (further citations omitted). "[T]he ultimate legal conclusion to be drawn from the fact[s] developed at the hearing [on a motion to suppress] is a matter for our review, particularly where the conclusion is of constitutional dimension." *Commonwealth v. Accaputo*, 380 Mass. 435, 448 n.18 (1980).

The motion judge's finding that the police did not have probable cause to seize her phone is clearly

erroneous. "Where a defendant's interview is video recorded, we are in the same position as the motion judge to determine what occurred during the interview and therefore independently make that determination." *Commonwealth v. Thomas*, 469 Mass. 531, 535 (2014) citing *Commonwealth v. Hoyt*, 461 Mass. 143, 148 - 149 (2011). The video recording shows that the defendant indicated she used her phone on the evening of the vicious assault to record her evening at various bars, and therefore, there was probable cause to seize the cellphone.

B. The motion judge erred as a matter of law when he found that the seizure of the defendant's phone was not supported by probable cause, when she admitted using it on the night in question to record video and she admitted the phone contained communications relating to the vicious assault.

The motion judge erred when he held that the seizure of the defendant's cellphone was not supported by probable cause, despite the overwhelming evidence she was using her phone on the evening of the assault and communicating with others. Specifically, the judge found that the seizure was not supported by probable cause, due to the case of *Commonwealth v. White*, 475 Mass. 583 (2016). (1/16-17) The judge's finding was

in error because the facts of the case at bar and the holding of *White* contrast markedly, and subsequent case law (discussed below) shows this issue has been evolving quickly and is very fact specific.

The Commonwealth states that the motion judge erred as a matter of law when he found there was no probable cause to seize the defendant's cellular telephone, despite the defendant admitting that she had her phone on her and took video and used "Snapchat" during the evening, received phone calls and texts from her grandmother involving the assault early in the morning, and the overwhelming evidence that the defendant was a suspect in the crime. The seizure of the defendant's cellular telephone was supported by probable cause based on information then known to police during the defendant's interview and statements by the defendant.

Before police may search or seize any item as evidence, they must have "a substantial basis for concluding that" the item searched or seized contains "evidence connected to the crime" under investigation (citation omitted). *Commonwealth v. Escalera*, 462 Mass. 636, 642 (2012). In other words, the government must "demonstrate[] . . . a 'nexus' between the crime

alleged" and the article to be searched or seized (citation omitted). See *Commonwealth v. Matias*, 440 Mass. 787, 794 (2004). "The nexus 'need not be based on direct observation.' . . . It may be found in the type of crime, the nature of the [evidence] sought, and normal inferences as to where such" evidence may be found. *Id.*, quoting *Commonwealth v. Cinelli*, 389 Mass. 197, 213 (1982), cert. denied, 464 U.S. 860 (1983). While police "need not make a showing beyond a reasonable doubt, '[s]trong reason to suspect is not adequate.'" *Commonwealth v. Kaupp*, 453 Mass. 102, 111(2009), quoting *Commonwealth v. Upton*, 394 Mass. 363, 370 (1985).

Applying the standard to seize a cellphone to the facts at bar, the Commonwealth has established a nexus between the crime and the cellphone. See *Commonwealth v. Matias*, 440 Mass. 787, 794 (2004). The victim admitted to having her phone on her person that evening, she admitted to using her phone, specifically to take video. She stated, alluding to possible exculpatory evidence on her cellphone, "I actually have videos of me at the bar and stuff." (D.Int.19) Police have probable cause that she recorded her location via video that evening. Police have probable

cause to seize evidence of her location that evening, which is recorded on her cellphone.

Here, the seizure of the defendant's phone was supported by specific articulable probable cause. The defendant admitted during the interview that she took "video" and "Snapchat video" on her cellphone during the evening of the assault, showing her whereabouts. (D.Int.19) She admitted she was in Barnstable during the evening in question, and she had her phone on her. She admitted using her phone and taking video with her phone. (D.Int.19) There were bloody handprints on her car, on the driver's side rear door. (1/30) The victim in the 911 call named her as the main suspect. (1/7) She admitted she had a key to the victim's house, there was no evidence of forced entry or motive of robbery, and the victim had a restraining order against her. (D.Int.30) Her car was observed in the area of the assault on that same evening, late at night, by a police officer. (2/117)

Further, she admitted to police that her grandmother, the victim's mother, called her and texted her on the morning after the assault, indicating that she was a "witness" for the assault on her uncle. (D.Int.26) The video reflects, that at

10:10:10, the defendant pulled her phone out of her pocket, looked at the screen, and listed the times of calls from her grandmother: 6:42, 7:26, 7:31, 7:32.

(D.Int.26) The victim stated her grandmother called her five times. (D.Int.26) She stated her girlfriend had called her two times. (D.Int.6, 9) The defendant, in turn, called and texted her grandmother in response. (D.Int.10) The defendant stated her grandmother told her that "you guys [police] were holding me as a primary witness for something that happened to my uncle at the house." (D.Int.7) The defendant said she learned through talking with her grandmother on her cellphone that her uncle was badly hurt. (D.Int.8) The defendant stated that she missed the calls and texts when she was sleeping because her cellphone was being charged. (D.Int.27) The defendant indicated that, in referring to her videos from the night prior, "because in one of my videos with Snapchat - it says my phone is dying." (D.Int.27)

The analysis of the seizure of the cellphone requires a brief discussion of case law involving cell site location information, where the defendant has video of her locations on the night of the assault. The Commonwealth, in this case, seized the phone to

view the "video" the defendant filmed at bars that evening. This video will provide her location with corresponding times. In light of the information known to the police, there was probable cause that the video of the primary suspect's location in the hours prior to the assault was reasonably related to the criminal investigation of the victim's assault by blunt object. See *Commonwealth v. Broom*, 474 Mass. 486 (2016); *Commonwealth v. Augustine*, 472 Mass. 448, 454-455 (2015); *Commonwealth v. Kaupp*, 453 Mass. 102, 110 (2009).

Further, the judge stated, "[b]y the time Connolly conducted the download, the Court's satisfied there was probable cause, because all of the pieces of the investigation had fit together by that point in time." (1/18) There was no change or development in facts of the investigation between the time that Connolly conducted the search of the cellphone.

The facts of this case are a far cry from those in *Commonwealth v. White*, the only case relied on by the motion judge. 475 Mass. 583 (2016) (3/16) In *White*, the Supreme Judicial Court held that in regards to the seized cellphone, "(a) they had reason to believe that the defendant had participated with

others in the commission of a robbery-homicide and (b) their training and experience in cases involving multiple defendants suggested that the device in question was *likely* to contain evidence relevant to those offenses." *White*, supra at 590. The detectives in *White* seized the defendant's cellphone the day after the homicide without any information that the phone was possessed by or used by the defendant on the night of the homicide. *Id.* The police simply relied on their training and experience that multiple-defendant cases involve communications with cellphones. *Id.*

The judge in this case noted that *White* was published five days after the interview in this case. The judge stated further, "[t]here is more than one person involved in this crime, there had to be some communication between them. So, let's grab the cellphone. It was quite common thinking in police work up until *Onyx White's* case. *Onyx White* tells us, that's not enough. There has to be probable cause." (1/17)

In *White*, the court found "[t]he detectives here lacked any information establishing the existence of evidence likely to be found on the defendant's cellular telephone." *Id.* at 592. Here, the detectives

had information establishing the existence of evidence likely to be found on the defendant's cellphone: the defendant herself stated she discussed the assault with her grandmother via texts and calls, and filmed video of her whereabouts that evening on her cellphone. A review of the interview video indicates that she reads times and numbers from her cellphone. Her statements provide probable cause that the phone contains evidence of the crime under investigation. *Contrast Commonwealth v. Broom*, 474 Mass. 486, 496-497 (2016) ("general" and "conclusory opinion" by affiant that individual is likely to store information in cellular telephone does not satisfy probable cause standard).

Here, police did not simply rely on training and experience that multiple defendants communicate with each other when they seized the phone; they had specific, particularized facts that the defendant used her phone to record video on the evening of the assault of her whereabouts, and used her cellphone to text and call with her grandmother about the assault. They had a statement from the victim that her phone was being used on the evening of the assault, and the battery was dying. Moreover, the police had specific,

articulable facts that the defendant had blood on her car, was observed in the area of the victim's home on the night in question, and she admitted she used her cellphone to record video. This video will show her location. The seizure of her cellphone is supported by the probable cause outlined above. This set of facts is a far cry from the scenario in *Commonwealth v. White*.

The judge's analysis of attenuation is flawed. Here, there was no illegal seizure of the cellphone. The seizure was valid, and the judge correctly held the defendant validly consented to the search of her phone, therefore, the motion to suppress should not have been allowed.

PRAYER FOR RELIEF

The Commonwealth respectfully requests that the Single Justice reverse the motion judge's allowance of the defendant's motion to suppress, or in the alternative, permit the Commonwealth to be able to appeal the motion judge's allowance of the defendant's motion to suppress.

Respectfully submitted,
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August 22, 2018

EXHIBITS

- A. Docket, *Commonwealth v. Fencher*, 1772-11
- B. Notice of Appeal
- C. Commonwealth's Motion to Stay
- D. Defendant's Motion to Suppress
- E. Consent Form
- F. Judge's Findings (transcript pages 15-18)